No. 10390

In the United States
Circuit Court of Appeals
For the Ninth Circuit

AGNES C. JACOB, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

SHIRLEY HAY JACOB, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

BEVERLEY JEAN JACOB, Petitioner,

vs.

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GWENDOLYN E. JACOB, Petitioner,

vs.

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PETITIONERS' REPLY BRIEF

On Petitions for Review of the Decisions of the United States Board of Tax Appeals.

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I

RE JURISDICTION TO DETERMINE ADDITIONAL TRANSFEREE LIABILITY

The validity of respondent's answer to petitioners' contention that respondent is barred by Sec. 272 (f) from prosecuting this proceeding must be considered in the light of the following fact situation.

Jacob, Conley and Barnes are alleged to have received between them in excess of $60,000.00. The total tax liability was but a small fraction of this amount. In the prior transferee proceeding against Jacob, Conley and Barnes, respondent sought to enforce liability for the amount of the deficiency only—a portion of the total tax liability for the "taxable year." The transferee liability for the entire tax for the taxable year could and should have been determined in that proceeding, notwithstanding the fact that the notice of liability was for a part (deficiency) only, because Sec. 272 (e) provides:

> "The Board shall have jurisdiction to determine the correct amount of the deficiency (transferee liability) even if the amount so determined is greater than the amount of the deficiency (transferee liability) notice . . . . . if claim therefore is asserted by the Commissioner at or before the hearing or a rehearing."

After the entry of the decision in that proceeding respondent moved to vacate the decision, to open the proceeding and to permit him to file an amended answer asserting transferee liability for the entire tax for the "taxable year." The Board denied this motion because it was not timely (tr. p. 43 and 51).

The Board had jurisdiction to determine the whole transferee liability in that proceeding. **(Peerless Woolen Mills vs. Rose, 28 Fed. (2) 661, American Woolen Co. v. White 56 Fed. (2d) 716, Bankers Reserve Life Insurance Co. v. U. S. 44 Fed. (2d) 1000)**

In **Lehigh Portland Cement Co. v. U. S., 30 Fed. Supp. 217,** the Court, referring to the legal effect of a petition for review filed with the Board of Tax Appeals held:

> "Upon this appeal the jurisdiction and authority of the board and the appellate courts extended not only to the amount of the additional deficiencies last determined by the Commissioner, but to the entire tax liability including the original tax paid."

If respondent was aggrieved by that decision and deemed it erroneous, his remedy was by appeal to this court. He did not appeal and that decision became final.

Respondent exhausted jurisdiction to proceed against Jacob, Conley and Barnes to impose **"any additional"** transferee liability.

Having prosecuted a transferee proceeding against the persons who were the alleged transferees of **all** the corporate assets, respondent is precluded from prosecuting any other proceeding to enforce "any **additional"** liability.

This is not a case where Jacob received part of the corporate assets and these petitioners another part of the corporate assets. Here one or the other—not both—received all the corporate assets. Either Jacob was liable as transferee of the assets or these petitioners were liable, not both.

The transferee liablity determined in the former proceeding was satisfied in full.

Neither was this a case where the commissioner is unable to satisfy in full the judgment for transferee liability against one transferee. In such a case, respondent could, of course, proceed against another transferee of **other** assets to satisfy the balance of the tax liability.

The liability of Jacob and of these petitioners, if any there be, is not joint and several as in the case where several transferees receive parts of the assets of the corporation. Having prosecuted the transferee proceeding against the one deemed liable and having obtained a recovery against him in full of the amount claimed and adjudged, the jurisdiction to enforce a "any additional" transferee liability was exhausted.

The **first** contention of respondent is to the effect that the limitation in Sec. 272 (f) (which precludes the respondent from making more than one assessment for one "taxable year") does not apply to transferee proceedings because, it is asserted, the section deals with "additional deficiency" and not with "transferee liability." The contention is untenable

Since Sec. 311 makes Sec. 272 (f) applicable, subject "to the provisions and limitations," the language of Sec. 272 (f) must be transposed to read as follows:

> "If the Commissioner has mailed to the taxpayer (transferee) notice of a deficiency (transferee liability) . . . . and the taxpayer (transferee) files a petition with the Board . . . . the Commissioner shall have no right to determine **any additional** deficiency (transferee liability) in respect of the same taxable year."

The dominant words in that section are "any" and "additional". These are comprehensive terms. They are applicable to any transferee liability. Having prosecuted a proceeding for one part of the transferee liability it precludes prosecution of a proceeding involving **"any additional"** transferee liability.

The respondent was obliged to pursue either Jacob or these petitioners, but, whichever one he pursued, he would have to assert and obtain a determination of the tax liability for the **entire "taxable year"** in the one proceeding.

If in the prior proceeding it had been determined that Jacob was not the transferee, respondent could have proceeded against another party who was the transferee.

In either proceeding (deficiency or transferee) it is the notice of assessment that initiates the proceeding and invokes jurisdiction. The limitation upon the jurisdiction of the Commissioner was designed to prevent the splitting of claims and to insure the determination of all questions pertaining to a single tax year in one proceeding.

Respondent claims that through inadvertance the prior transferee proceeding was invoked only as to a part of the liability for the "taxable year". If that be true, respondent had a right and it was his duty under subdivision (e) of Sec. 272, to present to the Board in that proceeding before the close of that case, the additional claim. Having failed to present that claim timely and having failed to appeal from the decision of the Board denying his motion to reopen the case, respondent is foreclosed by subdivision (f) from prosecuting another proceeding for "additional" tax liability for that "taxable year".

The **second** contention is that Sec. 272 (f) is not applicable because no "prior deficiency" was assessed against the petitioners.

The limitation is against determining "any additional" deficiency (transferee liability) in respect of the "same taxable year." It does not preclude proceeding only against the **same party** alleged to be transferee, but against anyone if it involves the same taxable year. The words "any additional" are not qualified by the phrase "against the same party" or words to that effect.

The only requirement as to notice is that it be given to the taxpayer (transferee). If notice was given to a transferee for a **part only** of the tax liability (when he could have been proceeded against for the entire liability), then the statute precludes respondent from taking any proceeding against anyone for "any additional liability.

Notice of assessment was given to Jacob in the prior proceeding for a part only of the tax liability. He could have been proceeded against for the whole of the tax. He petitioned for review and determination was made that he was transferee and liable as such for the amount claimed. **This exhausted the Commissioner's jurisdiction** under the statute to proceed against any one for "any additional" tax liability.

There can be but one transferee proceeding against the parties alleged to be transferees of a **single asset.** But there can be as many proceedings as there are separate transferees.

The distinction which respondent seeks to make between the liability for the "deficiency" in tax and the tax disclosed by the return, as to which there was no dispute, was rejected by **this court** in the **Ventura case, 86 Fed. (2d) 149, (9th Cir.).** See text of opinion, page 43 of Appendix.

The **third contention** is that if the petitioners' views prevail it would prevent the Commissioner from "following more than one transferee" if the Commissioner was unable to obtain satisfaction of transferee liability determined against one transferee.

The hypothetical cases referred to by counsel for the respondent are those in which **several transfers** were made to **separate transferees** who would become severally liable for the corporation's tax liability. Each transferee would be liable to the extent of the assets received by him and each transfer could properly be prosecuted as a separate proceeding until the full tax liability was satisfied.

Adoption of petitioners contention would not preclude such proceedings. In the case at bar there were no separate transfers of separate funds to Jacob and to the petitioners. **They were neither jointly or severally liable.** Only one or the other was liable, if there be any liability at all. Having asserted liability against the one deemed to be the transferee and having obtained a determination and satisfaction of the liability asserted, the Commissioner became subject to the limitation of the statute.

II

RE SCOPE OF REVIEW BY THIS COURT

It is argued that these "appeals largely involve questions of fact." That is not true. The contention that the findings are not supported by evidence presents a question of law. The contention that the Court below failed to apply legal tests to the appraisement of the evidence and in determining the probative valuc of the evidence presents a question of law. The crucial question whether petitioners can be held liable as transferees by reason of the receipt of the fund by Jacob and retention by him under claim of right, presents a pure question of law upon the undisputed and uncontradicted evidence.

In **U. S. v. Lam, 26 F. (2d) 830**, the court, in denying transferee liability, said:

> "The burden is on the government to prove that Lam received this $38,500 as a stockholder of the corporation. It has wholly failed to sustain this burden."

Respondent's assertion that the statute which places the burden of proof upon the respondent merely requires the establishment of a prima facie case is without justification. When the Congress imposed upon the respondent the burden of proof, in transferee cases, it used the term "burden of proof" in the same sense as the term "burden of proof" is used in connection with the trial of deficiency cases before the Board of Tax Appeals. It has been repeatedly held that in deficiency cases the burden of proof is to establish the petitioner's case by a preponderance of evidence. **Merten's Law of Fed. Income Taxation, Vol. 9, p. 283.** It may be true that where the Commissioner establishes a prima facie case **and no showing whatever is made by the petitioner,** that the prima facie case would be sufficient to sustain a finding of fact. But that is not true where the petitioners introduce evidence contrary to the prima facie case. The Commisisoner must then establish his case by a preponderance of the evidence and in appraising the evidence the Board must follow legal principles. It cannot refuse to believe what as a matter of law it should believe.

In **Blackmer v. Commissioner, 70 Fed. (2d) 255,** the Court held:

> "When the evidence before the Board, as the trier of the facts ought to be convincing, it may not say that it is not. (Citing cases.) And the **Board may not arbitrarily discredit the testimony of an unimpeached taxpayer** so far as he testifies to facts. A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling."

It can not arbitrarily ignore the inferences which must be drawn in favor of the petitioner. It can not refuse to accord to the petitioner the benefit of presumptions which the law recognizes.

The **Hutton case, 59 F 2d. 66,** decided by this court does not support respondent. In that case **there were no issues of fact. All of the facts were stipulated or admitted by the pleadings.** Hence there was only a question of law for the court to determine. The basic fact that the assets were transferred to the petitioner was admitted.

In the case at bar petitioners did not receive the money as Hutton did in the case cited. Therefore the basic fact upon which the transferee liability depends is in dispute. Upon that issue respondent had the burden of proof. The showing that Jacob received the money did not create even a prima facie case against petitioners. The Commissioner was required to establish by a preponderence of the evidence the facts which would impose liability upon them for Jacobs' acts. It is a question of law whether there is evidence to sustain such a finding.

In the case at bar the Commissioner traced the funds into the hands of Jacob but failed to establish facts which would trace the funds into the hands of the petitioners or make them liable for the receipt of the fund by him.

The other questions raised are all questions of law.

III.

RE OWNERSHIP OF STOCK

Respondent makes the contention that petitioners were the owners of the **stock** which was surrendered by Jacob when he received the fund in question.

We submit (1) that the ownership of the **stock** is an irrelevant fact in this case and (2) that the evidenciary facts referred to do not establish ownership of the stock by petitioners in any event.

The **stock** was not the property of the corporation. The **corporation did not transfer the stock** to petitioners or anybody else. The **subject matter of the transfer is the $20,400.00** which was received by Jacob. The sole question is whether petitioners received **this money** and **not whether they owned the stock.** If they received it they are transferees if the other elements are present, whether or not they were the owners of the stock. If they did not receive it it is immaterial whether they owned the stock or did not own the stock. In a large sense it is not even relevant or material whether petitioners acquired any beneficial right to the money, which they could enforce against Jacob. As long as Jacob retains it and insists that it is his own Petitioners are not transferees of that property. A mere right to recover the fund cannot make them transferees.

It is highly significant that **not a single case is cited in which a transferee liability was imposed upon any one who did not actually receive the assets which were being followed.** Nor is any judgment creditors action cited in which a liability was imposed upon any one who did not actually receive the assets which are alleged to have been transferred by the judgment debtor.

Now all of the evidenciary facts which are referred to by respondent (Br., pp. 27 to 37) merely go to establish **Jacob's intention to make a gift of the stock**—not the fund—a fact which he never disputed, but freely conceded. But his intention to make a gift of the stock or even the actual delivery of the **stock** could not make petitioners liable as transferees of the **money** received by Jacob. To establish that liability it was necessary to establish that Jacob intended to make a gift of the **money** (not the stock) and that he did, in fact, complete that gift by delivering and surrendering all dominion and control of the money to such an extent that he would become liable for conversion if he again took possession thereof, for that is the asset that is alleged to have been transferred and which is being sought in this proceeding in rem.

In **Allen-West Commission Co. v. Grumbles (C.C.A., 8th Cir.), 129 F. 287**, the court held:

> "* * * Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and **irrevocably divest himself of the title, dominion,** and **control** of the subject of the gift **in praesenti** at the very time he undertakes to make the gift (Citing cases); the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so **that the donor can exercise no further act of dominion or control over it** (citing cases); and the delivery by the donor to the donee, of the subject of the gift or of the **most effectual means of commanding the dominion of**

> it. This delivery must be an actual one 'so far as the subject is capable of it * * *' * * *"
>
> . . . .
>
> "There can be no gift which the law will recognize where there is **reserved** to the donor, either expressly or **as a result of the circumstances** and conditions attending the transaction, **a power of revocation or a dominion** over the subject of the gift. There can be no locus penitentiae, and there is always a locus penitentiae where the supposed donor may at any moment undo what he has done."

Obviously the gift of the fund (not the stock) was not irrevocably transferred within the purvue of these decisions. Jacob at all times had dominion and control over the stock and the fund to such an extent that he **could and did** revoke his intention.

If Jacob had failed to pay income tax on the profit derived from the receipt of the fund and had claimed the profit to be the revenue of the petitioners herein, respondent would most certainly have assessed a deficiency in tax as he did in the **Weil case** (discussed pages 4 to 10, Appendix of former brief).

All of respondent's discussion at this point is devoted to demonstrating that Jacob **intended** to deliver the stock to the members of his family, but nowhere in this discussion (pp. 27-29) is any reference made to testimony by Jacob to the effect that **he gave** the stock to the members of his family. The sum and substance of all of the testimony is that between July 26 and July 31, he asked Miss Alstrom, the stenographer in his office to prepare the certificates in the names of the members of his family (Tr. pp. 183-184). He then sent them to Seaside, Oregon, (**before they were executed**) with the request that the members of his family sign the blank endorsements on the back and return them to him. This was done. He testified:

> "They were endorsed as of August 10th and returned. **I retained them in my possession until August 17th when I delivered them to Barnes."** (Tr. p. 184.)

We did not say that the certificates were never executed. We said that the certificates were not executed **"at the time"** (former brief, p. 15) **they were sent to the members of the family to have the endorsement signed** by them and that they were **not executed until August 18th**, when Jacob delivered them to Barnes, which was the day after Jacob received the $18,000.00. **Barnes testified that they were executed on August 18th.** (Tr. 160-162)

Under these circumstances the sending of the certificates to the petitioners with the request that they sign the blank endorsement and return them to Jacob cannot possibly constitute a delivery of the certificates to them. The evidence is clear and unequivocal that after Jacob received the certificates, about August 10th, he retained them in his possession until August 17th (p. 184).

The petitioners were never given the certificates at any time **after they were executed by the officers of the corporation.** They endorsed unsigned certificates in blank and pursuant to his request they returned them to Jacob. He retained them and delivered them to

Barnes. There is no escape from these evidentiary facts. The inevitable conclusion to be drawn therefrom is that there was no delivery of the stock to petitioners and they never acquired title thereto.

It is argued, p. 29, that "Jacob clearly did not say . . . . that he did not give the stock" to petitioners, and that he did not say "that he ever abandoned an intention to give it (the stock)" to petitioners. While it is true that Jacob did not in his testimony use the quoted words, his evidence nevertheless establishes that fact for he told exactly what did in fact happen, from which the conclusion is inevitable that he did not give them the stock. When he says that the members of his family endorsed the unsigned certificates and returned them to him and that he kept them in his possession until he turned them over to Barnes, **it was unnecessary for him to state the converse**—that he did not give the certificates to his family. That follows as a matter of course. It is likewise true that he did not use the exact words "I abandoned my intention to give the stock to the members of my family." But that conclusion is inevitable from the testimony as to what was done. He did not in fact give them the stock and he did in fact turn it over to Barnes. The reason is obvious. He had agreed to turn over the stock to Barnes and he was to receive the $20,400 in exchange for it. He had come to the conclusion that it would be inadvisable to give the members of his family cash. He obviously did abandon his intention to give them the stock. It was not necessary for him to make a statement in negative form.

It must be remembered that the burden of proof that the gift of the **stock** was completed (if that be a material fact) was on the Commissioner. He was the one who had to establish the completion of the gift. The burden was not upon petitioners to establish the negative. Hence no inference unfavorable to petitioners could in any event be drawn from the failure of Jacob to testify negatively as to the facts upon which he gave affirmative testimony **(22 C.J. 112—former brief, p. 75).**

We repeat that the fact of the ownership of the stock is irrelevant for that is not the subject of the transfer. It is the **possession** (not beneficial ownership) of the $20,400.00 which is the only essential and material fact upon which transferee liability depends.

IV.

RE LIQUIDATION OF THE CORPORATION

Respondent does not in his brief controvert petitioner's contention that this case is ruled by the decision of this court in **U. S. v. Boss & Peake, 285 F. 410 and 290 F. 167 (9th Cir.),** nor is any attempt made to distinguish the case upon the facts or the law.

No attempt is made to distinguish the case at bar from the group of cases cited and discussed (pages 51-55 of our former brief) upon this phase of the case.

What is more significant is that not a single case is cited in which it was held that upon facts similar to those in the case at bar the transaction constituted a liquidation of the corporation.

The portion of the opinion of the court below quoted in the brief, pp. 29-30, does not supply any findings of fact lacking in the formal findings. It is merely the conclusion of the court below which it drew from the evidentiary facts in the case. The court below drew the conclusion that there was a liquidation from the fact that Jacob and Conley "decided not to continue in the hotel business." That circumstance had no probative value upon the issue whether the transaction was a sale of the stock or a liquidation of the corporation. Their desire to get out of the hotel business could be accomplished as well by a sale of their stock to Barnes as by liquidation of the corporation. The statement in the opinion that Barnes had no intention of buying the stock was the court's conclusion, and not a statement of fact. It drew that conclusion because it regarded the corporation as a "shell". This corporation was not merely a "shell", for it had left $20,400.00 which both Barnes and Conley said remained in the corporation. Before any money was paid out to Jacob or Conley the corporation had already purchased the Hines property and thereafter acquired Arlington Hotel property and operated it. Such a corporation never has been held to be a corporate shell.

The Court's statement that Barnes took down a pro rata of the insurance proceeds was an erroneous interpretation of the transaction for Barnes himself in his letter, Exh. 5, said (p. 166):

> "The money that was **left in the Central Holding Company** I can account for to the last penny."

and he said that this had reference to the $20,400 (p. 168). Conley said that this money remained in the corporation (p. 128) and part of that money ($5,000 of it) was used in the purchase of the Arlington hotel and another part ($4,000) was used in furnishing and repairing the hotel.

We submit that there was no finding of fact in the opinion which could supply the deficiency in the formal findings of fact made by the Court.

The assertion is made that petitioners' argument (pp. 46-56 of our former brief) upon this phase of the case is "without factual support except in the impeached and contradicted testimony of Jacob".

Now we set out in our argument a catalog of evidentiary facts upon which our argument was based. And we submit that it is not sufficient to charge that these facts are contradicted and the witness impeached. Fairness to the Court and petitioners required specific reference to the statements contradicted and to the testimony constituting contradiction or impeachment.

Reference is made to excerpts from Barnes' testimony (pp. 30-31) in which he speaks of he payment of the money as "distributions"; that he "treated as his own" the $20,400. This was merely Barnes' interpretation of the effect of the transaction.

How can Barnes' interpretation that the $20,400 was his own money be sustained or justified in the face of his written declaration made in January, 1938, that the money **"was left in the Central Holding Company"** and that part of it was actually used in the purchase of property by the Central Holding Company which was owned and operated by it.

How can Barnes' interpretation that he treated the corporation "as a name only" be reconciled with the fact that he actually intended and desired the corporation to function so that he could borrow money in the name of the corporation with which to rebuild or purchase other hotel property. Barnes stated in the same letter (Exh. 5, p. 165) that he was told by Jacob:

> "If the company was not carried on and we divided up the money it would cost both you and Conley and myself a thousand dollars apiece for income tax. You said if I carried on the company and built the hotel or bought a hotel, in case I did either one of these things, I could then turn the Central Holding Company back to myself, and there would be no income tax.
>
> "I relied upon you as an income tax man and followed through as per your instructions."

Now Barnes' statement as to Jacob's advise is substantially in accordance with the letter which Jacob wrote on August 18th. (Exh. 4, p. 142.) In that letter he quoted the statute, called attention to the fact that it required that the money be expended in acquisition of other property. He advised that it was **"absolutely necessary that you keep the Central Holding Company alive for the purpose of replacing the property"** and that the property must be acquired "in the name of the Central Holding Company" and so forth. Obviously Barnes contemplated following the procedure given to him orally and repeated in the letter, all of which contemplated that the corporation should be real and not a shell; that it was to be the owner of property and function as such until such time as "you and such other stockhelders as you may have in the company" may desire to liquidate the corporation.

It was clearly contemplated that liquidation of the corporation should take place only as and when the stockholders should deem it advisable, but only after the corporation had functioned as such, in the manner contemplated by the statute and in the advise given by Jacob to Barnes and Conley. The corporation did so function.

In the face of these uncontroverted facts, it is obvious that Barnes' characterization as to the corporation being a name only and that he "treated the money as his own" has no probative value and cannot influence the legal effect of the transaction as it was actually contemplated and carried out.

In the **Boss & Peake case,** decided by this court (a transferee case in which one of the stockholders acquired the stock of the other stockholder) the District Court actually found that upon the oral testimony there was a preponderance of the evidence in favor of the determination that the transaction was a liquidation. Nevertheless the Court rejected that oral testimony and held the transaction to be a sale of the stock by one stockholder to the other (although corporate assets were used to pay therefor), because the legal effect of what was done constituted a sale, not a liquidation, and **this court affirmed the judgment.** We submit that the transaction in the case at bar must be considered and determined according to its legal effect and not according to the interpretation of Mr. Barnes.

V.

RE CONTENTION THAT RECEIPT BY JACOB WAS THE RECEIPT BY PETITIONERS

It is not contended by respondent that the fund in question actually came into possession of the petitioners. It is only contended that receipt of the fund by Jacob was constructively receipt by petitioners which subjects them to transferee liability.

Here again it is highly significant that **not a single case is cited where transferee liability was imposed on anyone who did not actually receive the assets pursued** where the assets were received and retained under claim of right by someone other than the party proceeded against. Indeed, no case is cited imposing transferee liability on the theory of constructive receipt even where there is a conceded relationship of principal and agent or trustee and beneficiary.

It is also significant that no attempt is made to distinguish the authorities we cited (pp. 19-27) in support of our contention that transferee liability cannot be predicated on the theory of constructive receipt especially when the party receiving the property does so under a claim of right and retains the same adversely to the parties proceeded against.

In **North American Oil Consolidated v. Burnett, 286 U.S. 417,** the Supreme Court held that the taxpayer was not taxable on account of income which "it had not received and which it might never receive."

In **Gutman v. Commissioner, decided by The Tax Court of The United States, December 29, 1942, Docket No. 107985,** the Board in rejecting the contention of constructive receipt said that "to charge the petitioner with income . . . which he did not receive and might never receive . . . would violate the realism in the law of taxation of income."

In **Commissioner v. McCall, 26 B.T.A. 292,** the Board declined to impose **transferee liability** on a beneficiary where the funds were received by and were still in the possession of the trustee.

The **Maryland Casualty Co.** case and **Schaupp** case, cited on page 32 are not transferee cases. Both were proceedings against the taxpayer for deficiency in tax.

In the **Maryland Casualty Co. case** agents of an insurance company collected premiums for the company in December but did not remit them to the company until the following January. The sole issue was whether the company was obliged to report those premiums as revenue as of the time when they were collected by the agents or as of the time when the agents remitted to the company. The Supreme Court held that the receipt by the agent constituted for income tax purposes the receipt by the company because under the contract the company had control over that fund so that even while it was in the hands of the agent the company could direct the agent to use the fund in payment of claims against the company.

This case does not apply to the case at bar, because in the case cited there was no issue as to the ownership and control of the fund. It was a consentual agency. The agent did not and could not claim any right to retain the money in his own right adversely to the interest of the company as Jacob did in the case a bar.

In the **Schaupp case, 71 Fed. 2d 736,** cited by respondent, the taxpayer had a life estate in the property of her deceased husband. Her son was the residuary legatee. He managed the property and collected the income. During the tax year in question, the property had earned $13,000.00, which income belonged to the taxpayer, but she only drew $200.00 a month and allowed the remainder of the income to be left in the possession of her son. The son claimed no right, title or interest in the excess revenue. He held it for his mother. The court held the entire income taxable because

> "It belonged to her, and she had the right to withdraw, appropriate, and use it. As was said by the Supreme Court in Corliss v. Bowers, 281 U. S. 276, 50 S. Ct. 336, 337, 74 L Ed. 916:
>
> " 'The income that is subject to a man's **unfettered command** and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.' "

Obviously, petitioners in the case at bar did not have the **"unfettered command"** of the fund which Jacob received under claim of right. Petitioners were not "free to enjoy at their own option" the money received by Jacob under claim of right.

The conclusion that Jacob was acting for petitioners is predicated upon testimony by Mrs. Jacob, one of the petitioners, to the effect that her husband prepared the income tax returns and gift returns (which she called statement regarding the stock) for her "as my legal advisor and my attorney", that she signed at his request because she had implicit confidence in his integrity. We submit that this does not warrant a legal conclusion that Jacob was her **agent to sell her property** without her knowledge or consent **or to receive money** in payment of her property **or to execute receipts** on her behalf. We have never heard it suggested that an attorney who has authority to prepare an income tax return for his client also has authority to dispose of his client's property or to bind him by declarations of which the client has no knowledge. Many husbands and fathers have from time to time prepared papers for members of their families, but no one would suggest for a moment that that conferred upon him authority to dispose of their property without their knowledge or consent.

Respondent supports the contention of agency by pointing to the receipt signed by Jacob, but that was merely **Jacobs' own declaration**. Agency is never established by ex parte declarations. There is not a scintilla of evidence that Jacob ever handled any transaction for any of the petitioners which involved the disposition of property owned by them or which involved the receipt of money by him for their account or in which he executed papers for them with their knowledge and consent from which agency might be inferred. The three daughters had no interests or business affairs in which Jacob acted for them. Their only property consisted of the promise which he made to give the stock to them, and the preparation of income tax returns for them which resulted from the promise to give them the stock. Other than that there is no evidence of any course of conduct from which agency could be inferred so as to impose upon them personal liability for his receipt and appropriation of the fund in question.

VI

RE RETENTION OF FUND BY JACOB

It is argued that Jacob did not testify in so many words that he appropriated the mony "in complete derogation of any right that the petitioners may have had to it." It is, of course, true that Jacob did not use these words, but the sum and substance of his testimony leads to that conclusion. Respondent only calls attention to a fragment of his testimony upon this subject. He testified that after he received the $2400.00 he gave no part of it to petitioners, nor did he put in a special fund for them. He utilized it for his own purposes (p. 183). When he received the

$18,000.00 he gave no part of that mony to any member of his family. He did not give them money or the equivalent of money, either in the form of bank deposits or other equivalent of money. He did not set it aside or deposit it in any trust fund or other account for them. "I used it for my personal needs. I never conveyed any property of any kind to any of them in lieu of that money." (p. 184) **This was the testimony of appropriation of the funds by him for his own use.** The portion of his testimony which is quoted on page 35 of respondents brief states his reason for the appropriation of the fund by him and that was in substance that he had intended to make them a gift of the **stock** (not the money). But when the conditions suddenly changed, he abandoned his intention to make a gift of the stock and appropriated the money that he received from the disposal of the stock. It is not true as asserted in respondent's brief, p. 35, that Jacob often referred to the "money" as his family's and that "nowhere was it stated to the contrary." The very testimony which respondent quoted says so. He testified:

> "The question of making them gifts of cash was not within my purpose and I felt it would be unwise."

In this case, we are not concerned with the ultimate determination of the legal ownership of the **stock.** He believed that he had the right to change his mind about giving his family the stock and the proceeds which he received from the disposition thereof.

Whether he was legally correct in his conclusion is wholly immaterial. The material fact is that, believing that he had the right to do so, he exercised his prerogative and retained the money as his own. When he testified to the appropriation of the fund to his own use, it was the highest type of evidence that he did so in derogation of any right petitioners may have had thereto. If he had used the words in his testimony that he appropriated the money in derogation of petitioners' rights, respondent's counsel would promptly have objected to it as a conclusion. Whether he retained it in derogation of petitioners' rights is determinable from the testimony as to what he did and his reasons for doing so, and when his conduct is appraised in this respect, it is obvious that he did appropriate the money in derogation of petitioner's right thereto. Whether he was right or wrong in doing so is beside the point. The fact remains that they did not get the money because he believed they were not entitled to it and hence they could not be charged with personal liability.

The only time that a transferee can be charged with personal liability, as distinguished from the liability **in rem**, is when it is made to appear that the transferee actually received the res, so that his status as transferee becomes legally fixed, and thereafter disposes of the res. **The personal liability would then be substituted for the liability in rem.**

We submit that there is not the slightest foundation for the gratuitous assertion that the refund of the taxes paid by the petitioners was "an erroneous refund." No such contention was ever made or even suggested. The refund was made because it was determined that these petitioners were not the owners of the stock and had not received the money from the corporation. It was merely asserted that they later received the money from Jacob as a gift, a contention that has since been abandoned.

This refund was made to pave the way for the assertion of transferee liability against Jacob.

RE CASES CITED BY RESPONDENT

The **Hutton** and **Fairless cases** cited by respondent are discussed at pages 45 to 48 of Appendix.

VII

RE INSOLVENCY AND EXHAUSTION OF REMEDIES PRIOR TO COMMENCEMENT OF TRANSFEREE PROCEEDING

A

It is argued that it was unnecessary to establish in this case the exhaustion of remedies against the taxpayer prior to the commencement of the transferee proceeding because the corporation was dissolved and therefore could not be proceeded against by action. This contention has no support in fact or in law. The alleged transfer took place in August, 1937. The corporation was dissolved by proclamation of the Governor on January 6, 1941 (tr. p. 211). The notice of transferee liability is dated April 8, 1941. For at least a part of that **intervening period** of more than three and a half years the corporation actually functioned, and bought, owned and operated hotel property. During that time its primary tax liability could have been enforced.

The ultimate dissolution did not terminate the corporation or prevent proceeding against it.

Sec. 77-259 Oregon Compiled Laws Annotated, keeps a corporation alive for a period of five years after dissolution for the purpose of liquidating its assets and paying its liabilities and it can sue or be sued to the same extent as if it had not been dissolved.

See text of statute, page 58 of Appendix.

The dissolution of the corporation did not preclude proceeding against it where there is a statute similar to the Oregon law. (**Ray vs. Comm., 24 B.T.A. 94-96** (see page 58 of Appendix).

Respondent argues the point as though the crucial time is the date of the notice of transferee liability. That is not true. The crucial period of time is the time of the transfer and the period of time immediately following. If the transferor—taxpayer—had property out of which the primary tax liability could have been satisfied the respondent was obliged to pursue the corporation. He could not wait indefinitely until the corporation ceased to do business, disbursed its assets and then initiate transferee proceedings. If he could have satisfied the liability at any time during the intervening period against the primary obligator, he is precluded from thereafter proceeding against the alleged transferee.

B

It is next contended that proceeding against the taxpayer was not required as a condition precedent because it would have been futile. This contention is likewise unsupported by the record.

Here again respondent proceeds as though the possibility of enforcement of the liability against the taxpayer must be determined as of the date of the notice of transferee liability. The law is that the crucial time is the time of the transfer and the intervening period. **(Terrace case, page 24 Appendix former brief.)** If the corporation had assets out of which the transferee liability could have been satisfied, it cannot be contended that proceedings against the taxpayer would have been futile.

Respondent has not sustained the burden of proving futility, for the corporation actually had at least $20,400.00 which remained in the corporation. After the purchase of Arlington Hotel, there remained the undistributed portion of $20,400.00, which was in excess of $11,000.00. Ownership of these assets by the corporation can not be read out of the record by the liberal resort to adjectives.

C

It is asserted that the finding that the taxpayer was left insolvent at the time of the transfer is "amply supported by the uncontradicted evidence."

The evidence of the corporation's financial condition at the time of the alleged transfer and subsequent thereto is discussed at length at pages 65-72 of petitioners' former brief. Appraisal of that evidence demonstrates that respondent failed to sustain the burden of proof that the corporation was left insolvent as the result of the alleged transfer.

CASES CITED BY RESPONDENT

We have no quarrel with the cases cited in respondent's brief, page 40, insofar as they hold that respondent need not bring any proceedings prior to the initiation of transferee proceedings **if they would be futile.** But we take issue with respondent that they support the proposition that **in all cases** transferee proceedings can be initiated "in the absence of insolvency" and "without first attempting to collect the tax from the transferor."

The burden of proof was, of course, upon respondent to establish futility of proceeding against the taxpayer. There is no support for a finding that such proceeding would be futile.

The concluding sentence in the quotation from the **Coffee Pot Holding Corporation case** (res. br. p. 41) was pure dicta and not essential to the decision of that case because it was found in the Coffee Pot case, as a fact, upon ample evidence, that proceedings would be futile. The dicta was general and entirely too broad and is not supported by the cases cited in support thereof.

In the **Wheeling Mold & Foundry Co. case,** there cited, it was held that a prior proceeding against the taxpayer was unnecessary because in that case the action was **based upon an agreement** by which the transferee **assumed the payment of the debt.** Its liability was therefore primary upon the assumption agreement.

In the **American Equitable Assurance Co. case** the action was also on an **assumption agreement** by which the transferee specifically assumed "all taxes". That too, created primary liability which could be enforced directly without any conditions precedent.

In the **Hatch case,** the sole asset of the taxpayer was a lease. This lease was transferred to the Morasco Holding Co. This left the transferor without any assets whatsoever.

There was no issue of fact upon that subject. The case was submitted "upon an agreed statement of facts." Under these conditions it is obvious that proceeding against the transferor would be futile.

The dicta referred to above obviously went beyond the scope of the decisions cited.

In **U. S. v. Garfuncle,** cited by respondent, the question arose on demurrer to the complaint which necessarily **admitted** the allegation made therein of insolvency of the taxpayer and futility of proceeding. In the case at bar there was no allegation of futility in respondent's answer and the allegation of insolvency was denied, thus raising an issue. Futility is dispelled in the case at bar because the corporation actually had assets.

VIII

RE ESTOPPEL

A

Respondent contends that he is not estopped by the prior proceedings from asserting this transferee liability against petitioners because they failed to establish, that they relied upon respondent's conduct and changed their position for the worse by acting thereon. Petitioners do not claim the benefit of "equitable estoppel". Petitioners invoke the doctrine of "estoppel by judgment." Change of position is essential to "equitable estoppel," but not to "estoppel by judgment." The latter **doctrine is one of public policy. (Tait vs. Western Maryland Ry. Co., 289 U.S. 620.)**

The basis of the doctrine of estoppel by judgment is stated in **15 R.C.L. 953, Sec. 430.** The writer says:

> "An estoppel by verdict and judgment is founded on the principle of the maxim, Interest reipublicae ut sit finis litium, and the true limits of the doctrine are accurately stated in another maxim, Memo debet bis vexari si constet curiae quod sit pro una et eadem causa. Public policy

> and the interest of litigants alike require that there be an end to litigation, and the peace and order of society demand that **matters distinctly put in issue and determined** by a court of competent jurisdiction as to parties and subject matter shall not be retried between the same parties in any subsequent suit in any court."

B

Petitioners do not claim that the doctrine of res judicata applies. We invoke the rule of "estoppel by judgment" and to make it applicable, identity of issue or fact is sufficient.

If there is a common issue of fact, the doctrine applies. In **15 R.C.L. 593** in discussing the scope of res adjudicata and estoppel by judgment the writer says:

> "A judgment may, however, operate as an estoppel in another action between the same parties **as to matters in issue or points controverted**, upon the determination of which the finding or verdict was rendered, **though the second action is upon a different claim or demand.**"

The prior adjudication of the fact in issue is available to the parties and **their privies.** According to respondent's theory, Jacob and petitioners are in privity for it is claimed that they received the fund through Jacob.

In **Portland Gold Mining Co. v. Stratton's Independent, 158 F. 63 (8th Cir.)**, Justice Van Devanter, after an extensive review of the decisions said:

"When the plaintiff has litigated directly with the **immediate actor** the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, 'Interest reipublicae ut sit finis litium,' may well be applied."

This case has been frequently cited and is regarded as a leading case.

The principle there affirmed is applicable in the case at bar with greater force, for here respondent not only brought prior proceeding against the one who was the "immediate actor" but it obtained a judgment against him **sustaining respondent's contention.**

Respondent makes the bald assertion that there was no privity between Jacob and these petitioners. No authority is cited in support of that assertion. It is only claimed that the case of **Tait vs. Western Maryland Railway Co.** is not authority for the proposition that there is privity between Jacob and the petitioners.

In the **Tait** case the first proceeding was against the **Commissioner** to re-determine a deficiency assessed against the taxpayer. The Second proceeding was by the taxpayer against the **collector** to recover refund. The Supreme Court held that there was privity between the Collector and the Commissioner so as to make the prior determination operate as an estoppel because the Collector was in effect the **agent** of the Commissioner. It was the **element of agency** that created the privity and not the mere fact that they happened to be public officials. The Court said:

> "We think, however, that where a question has been adjudged as between a taxpayer and the government or its official **agent,** the Commissioner, the collector, being an official inferior in authority, and acting under them, is in such **privity** with them that he is estopped by the judgment. See Second National Bank of Saginaw v. Woodworth (D.C.) 54 F. (2d) 672; Bertelsen v. White (D.C.) 58 F. (2d) 792.

The two cases cited by the court in that decision confirm this view.

In the case at bar, respondent contends that petitioners are liable in this proceeding because the receipt of the fund by Jacob was constructively receipt by them. Obviously that makes them in privity with respect to the fund in question. In the **Tait case** the Collector collected the taxes as agent of the Commissioner. In the case at bar, it is claimed by respondent that Jacob collected the fund on behalf of the petitioners. Obviously the same principle is here applicable.

It is argued that the Commissioner is not prohibited "from taking inconsistent positions in cases involving other parties" and several cases are cited in support of this assertion.

We are not concerned merely with the right of the Commissioner to take inconsistent "**positions.**" We are concerned with "**determinations**". It may be that as long as no determination is made that the Commissioner may change his position if it develops that he was in error. But when with knowledge of the facts he has taken a position **and a determination is made thereon by himself** or by the courts in litigation, the authorities are agreed that he is estopped by such **determinations.**

The cases cited by respondent on the subject of estoppel are discussed at pages 48 to 51 of Appendix.

C

RE ELECTION OF REMEDIES

There is no foundation for the distinction which respondent makes between this case and the **Brown case** (p. 37 Appendix, former brief). Respondent has maintained throughout and maintains here that the receipt of the fund by Jacob was constructively receipt by petitioners on the theory that he was their agent or trustee. In order to maintain the distinction, respondent would now have to repudiate the contention that Jacob was petitioners' agent or trustee and, with such repudiation, the contention that petitioners are transferees must, of course, fail.

On the other hand if a relationship does exist, then respondent had choice of proceeding against one or the other but not against both.

Insurance Co. of North America v. Fourth National Bank, 28 F. (2d) 933 (5th Cir.).
Henderson Tire & Rubber Co. v. Gregory, 65 F. (2d) 589.
28 C.J.S. 1073, Sec. 8.
18 Am. Jur. 135, Sec. 12.
2 C.J. 843, Sec. 526.
McNamara v. Chapman, 31 A.L.R. 188.

(See text of the foregoing authorities at pages 51 to 55 of Appendix.)

When the proceeding against Jacob was initiated, respondent had knowledge of all the facts. He had already considered whether Jacob or petitioners were transferees in the earlier proceeding, which resulted in the refund of the tax paid by the petitioners. The facts were also narrated in the memorandum which was attached to the income tax returns. Full investigation had been made. The funds at that time and at all times thereafter were in the hands of Jacob. They were not turned over to petitioners.

Under these conditions respondent was called upon to pursue Jacob as transferee or to pursue these petitioners as transferees of the identical fund. He elected to treat Jacob as the transferee, prosecuted the transferee proceeding against him and **established therein Jacob's status as transferee.**

Respondent in that proceeding was required to allege a fact and assume a position "inconsistent with" or repugnant to the facts now alleged, for in the prior proceeding respondent alleged that Jacob was the transferee and specifically denied Jacob's allegation that the present petitioners were the transferees. (28 **C.J.S. p. 1073, Sec. 8.**)

This case is analogous to the cases in which a plaintiff elects to sue the agent or the undisclosed principal after discovery of the facts and it is uniformly held that the prosecution of an action against one forecloses proceeding against the other. Having elected to treat Jacob as the transferee, and having established that status, there was a repudiation of the contention that petitioners were the transferees.

In **Eichelberger & Co. v. Comm., 88 F. (2d) 874 (5th Cir.)** the Court said:

> "'He cannot justly decide in 1930 that the sale did not realize the loss and thereby collect increased taxes, and in 1932 decide that it did realize the loss and collect taxes accordingly again . . . The United States got the benefit of his decision then and ought to abide by it now.'"

The **Peir case** and the **Pierce case** cited by respondent are discussed at pages 55 to 57 of Appendix.

Respectfully submitted,

S. J. BISCHOFF,
Attorney for Petitioners.

APPENDIX

APPENDIX

In the **Ventura case, 86 F. 2d 149 (9th Cir.)**, the Commissioner served a deficiency notice upon the taxpayer. The taxpayer filed a petition with the Board to redetermine the deficiency. Pending this proceeding, the Collector attempted to enforce by distraint the collection of the portion of the tax for the taxable year in question which was not in dispute. The taxpayer sought an injunction to enjoin the collection on the ground that the Board of Tax Appeals had acquired jurisdiction over the entire tax for the year in question which was subject to redetermination. This court, in sustaining the right to an injunction held:

> "That proceeding is for the redetermination of the **whole tax** in which there may be determined a **refund** to the taxpayer of all or part of his original payment, or, he may be found to owe the government an even greater sum than the amount computed by the Commissioner in his assessment letter. The Commissioner need not claim the increase in his pleading on the appeal, but as the proof progresses he may assert it at the hearing. He may assert it even at a rehearing. **That is to say, the Board has a free hand to proceed to determine the total tax due and the amount not paid regardless of the form in which the issue is presented.**
>
> "These are risks facing both the taxpayer and the Commissioner at the hearing before the Board, as shown by the provisions of the statutes:"
>
> . . . .
>
> "Such is the holding of Peerless Woolen Mills v Rose (CCA), 28 Fed. (2) 661, 662,"
>
> . . . .

> "'We are of the opinion that it results from these statutory provisions that, while the Board has no jurisdiction where there is no deficiency assessment, yet, if there is a deficiency assessment, the jurisdiction of the Board extends to the **whole controversy,** to the end that it may determine or redetermine the correct amount of the tax."

The dissenting opinion of Justice Wilbur concurs with the majority upon this phase of the case. He said:

> "The opinion of the majority sustains the contention of the Collector that on the appeal from the second deficiency letter the Board of Tax Appeals had jurisdiction to determine the total tax due from the taxpayer for the years 1920 and 1921. This decision is in accord with the decision of the Circuit Court of Appeals for the Fifth Circuit in **Peerless Woolen Mills v. Rose, 28 F. (2d) 661,** cited by the Attorney General in support of his contention. That court declined to enjoin the collection of a tax assessed October 19, 1919, because it appeared that an appeal had been taken from a second deficiency assessment made December 18, 1925, and the question of the validity of the first assessment (also a deficiency assessment) was thus presented to the Board of Tax Appeals. The court stated, '* * * the jurisdiction of the Board extends to the whole controversy, to the end that it may determine or redetermine the correct amount of the tax.' This view is in accord with a decision of the Circuit Court of Appeals for the First Circuit in **American Woolen Co. v. White, 56 F. (2d) 716.** That court cites with approval the decision in **Peerless Woolen Mills v. Rose, supra,** and **Bankers Reserve Life Ins. Co. v. U. S., 44 F. (2d) 1000, 1002,** and holds that on an appeal from a second deficiency notice given December 17, 1930, the Board of Tax Appeals had

jurisdiction of an assessment made on the taxpayers' return in 1922.

"I am inclined to agree with my associates that the Board of Tax Appeals, on the appeal of the taxpayer from the second deficiency letter, had jurisdiction to consider and determine the entire tax of the taxpayer for the year."

Since a transferee proceeding is to be initiated and determined it follows as a matter of course that when respondent prosecuted the former transferee proceeding against Jacob, Conley and Barns, and a petition to review was filed with the tax court, that this jurisdiction to prosecute a further transferee proceeding for the taxable year was exhausted, "in the same manner and **subject to** the same provisions and **limitations** as in a case of deficiency in a tax imposed by this title."

The **Hutton case,** cited by respondent (br. p. 35) is not at all in point. No attempt was made in that case to fasten transferee liability by reason of an alleged constructive receipt of the corporate asets. In that case Hutton, the sole stockholder, **actually** received all of the assets of the corporation upon dissolution. No attempt was made to hold him by reason of the receipt by someone else for his account. At the moment he received its assets, his liability as transferee accrued. His subsequent disposition of the funds could not affect that liability. The only effect of the subsequent dissipation of assets received was to convert his liability in rem to a personal liability. So long as the transferee has the assets the liability is in rem. This idea is made manifest by the quotation from **Rogge** on transferee liability, quoted on page 36 of the respondent's brief. He points out that the proceeding is **in rem** and that where the transferee has "dissipated or disposed of the property so that a decree to set aside the conveyance would be impossible or impractical personal liability entered against him."

In the case at bar, petitioners have neither received nor have they dissipated any assets of the corporation and hence there could be no personal liability on their part.

In the case at bar the res being pursued was traced to the hands of Jacob. There the transition stopped and if there was any transferee liability it was upon him. This liability was asserted by respondent against him and it was established and satisfied.

The **Fairless case**, cited by respondent (p. 36), is not at all in point. There the Union Finance Co. (taxpayer) transferred all its assets to The Metropolitan Securities Co., in exchange for the stock of the latter company. The Union distributed this stock to its stockholders without liquidating its tax liability. Transferee liability was assessed against the stockholders of the Union on the ground that they received the assets (Metropolitan stock) of the corporation. The petitioners there made the contention that only the recipient of the physical assets or property of the Union—the Metropolitan—was liable as transferee. The Board and the Circuit Court of Appeals rejected this contention, and rightly so, because the Union had merely exchanged its physical property for capital stock of the Metropolitan. This transaction alone, prior to the distribution to the stockholders, did not impair its ability to pay its tax liability. It was the subsequent distribution of the Metropolitan stock to the stockholders (petitioners) which stripped it of assets with which to meet its tax liability and the stockholders having received its assets became liable as transferees regardless of the question whether the Metropolitan could have been held liable therefor. These stockholders were, of course, liable to the extent of the value of the stock they received from the Union. There is nothing in common between the case cited and the case at bar. In the **Fairless case** the Metropolitan stock which the Union received was the res. This was the res that was transferred to the stockholders—petitioners—and they were liable in rem therefor.

Section 77-259 in Oregon Compiled Laws Annotated provides that:

> "All corporations that . . . have been dissolved by proclamation of the governor, as by law provided, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending any actions, suits or proceedings by or against them, settling their business, disposing of their property, both real and personal, dividing their capital stock, and doing any and all things necessary for the care and preservation of their property, both real and personal, but not for the purpose of continuing their corporate business. During such five-year period after such dissolution, they shall continue as such bodies corporate, for the purpose of causing to be executed on behalf of such corporations conveyances of or other instruments affecting title to such property, for being made

> parties to, and being sued in any action, suit or proceeding against them, for the recovery of any property, or the enforcement of any remedy against them, or against any property or the enforcement of any remedy that might have been had prior to such dissolution."

In the **Iglehart case**, cited by respondent on page 46, the Commissioner in one proceeding took the position that a certain transfer was not made in contemplation of death. In the second proceeding he took the opposite position. But the first proceeding was pending and undetermined when the latter proceeding came on for trial. While the second proceeding was under consideration, the first proceeding was determined adversely to respondent's contention. The ruling of the Court was consistent with the position taken by respondent in the second proceeding. There was no inconsistency between the "determination" in the first proceeding and that taken in the second proceeding.

In the case at bar, however, the Commissioner not only made the contention in the two former proceedings that Jacob was the transferee but actual **determinations** were made thereon in accordance with his contention. The determinations are inconsistent with the contention now advanced. The situation is the reverse of the situation in the **Iglehart case.**

The quotation appearing on page 46 of respondent's brief standing alone is misleading. To get the full significance of the ruling in that case, the decision of the Board of Tax Appeals (28 B.T.A. 888) and the full text of the decision by the Circuit Court of Appeals must be read together. The Circuit Court of Appeals pointed out that the first contention made by respondent was overruled by the decision of the Circuit Court of Appeals.

Moreover, in that case petitioner did not claim the benefit of the rule of estoppel by judgment. The question arose on the petitioners request that the court take judicial notice of the prior pending proceeding to "disclose that in that case respondent took an inconsistent position." **The offer was refused because no showing had been made as to the nature of the prior proceeding to demonstrate relevancy.**

The observations of **Mr. Griswald** in his article in **46 Yale Law Journal 1320,** to which respondent's counsel refers do not support respondent's position. The observations of Mr. Griswald are of little practical aid in considering the question involved. He does not attempt to state what the rule is upon this subject. He merely calls attention to the fact that in some cases the doctrine of estoppel was applied but not in others. He calls attention to three cases, to wit, the **Iglehart case,** which has already been discussed, the **Blair case 300 U. S. 330,** and the **Hall case, 31 B. T. A. 125.**

As already pointed out in the **Iglehart case,** the matter referred to was not a determination by the Commissioner, Board of Tax Appeals, or the Courts. It was merely a position taken by the Commissioner and at the time it was offered in evidence had not yet been determined by any Court. It was later rejected by the Court.

In the **Hall case**, the first proceedings was against the corporation which had exchanged stock for stock and involved the determination of the basis of valuation. The corporation claimed that no gain was recognizable because it was a tax free exchange. The second proceeding was against the individual stockholder Hall, who had received some of the stock and it was asserted that the determination in the corporation case was an estoppel against the commissioner. But the Board declined to give the effect of an estoppel to the prior proceeding against the corporation because:

> "When the case was called for hearing, no appearance was entered upon motion of counsel for respondent the case was dismissed for failure to prosecute and decision was entered for the respondent . . . It is sufficient to say that the default decision entered at Docket No. 63206 was not an adjudication on the merits and can not in any way operate to bar the respondent from maintaining this cause or prevent their determination of the question presented on the issues raised."

It was obvious, therefore, that the refusal to treat the prior case as an estoppel was not because it could not do so, but because no determination was made.

In the **Blair case** the Court refused to treat the prior proceeding as an estoppel because subsequent to the determination of the first proceeding there was "**created a new situation.**" It is obvious from the decision that if that new situation had not intervened that the prior determination would have been given the effect of an estoppel.

When the basis of the decision in these cases is kept in mind, Mr. Griswald's observations can be accorded very little authoritative effect. Indeed he did not attempt to lay down any rule. He merely pointed out the cases in which prior proceedings were held to be or not to be estoppel.

In the **Gwin case** cited by respondent (p. 46) the application of the rule of estoppel by judgment was not raised, discussed or passed upon by the Board or by the Court of Appeals. The petitioner in that case had no relationship to the petitioner in the prior proceeding. They were both members of a syndicate from the operation of which each derived certain profits, but there was no relationship between them that would involve a question of the responsibility of one for the acts of the other. Each proceeding involved the personal tax liability of each of the parties. Neither the petitioner nor the respondent in that case claimed that the prior determination was conclusive.

In **Insurance Company of North America vs. Fourth National Bank, 28 F. 2nd 933 (5th Cir.)** an employee of the bank embezzeled funds by cashing drafts at the defendant bank, with which plaintiff had a bank account. Plaintiff sued the bank on the ground that they cashed the drafts on forged endorsements. It was established, however, that plaintiff had brought an action against its employee and his wife, that some adjustment of the action was made, whereby plaintiff received property and funds from the employee and his wife, but the suit was not dismissed. The court held:

"In such circumstances, we think the lower court was correct in holding that the plaintiff had made an election to pursue the property and funds in the hands of its agent, and could not thereafter maintain its claim for money had and received against defendant." (citing many cases.)

In **Henderson Tire & Rubber Co. vs. Gregory, 65 F. 2nd 589,**—49 A. L. R. 1503-1510, the Court held:

"The doctrine stated in its simplest form means that, if a party has two inconsistent existing remedies on his cause of action and makes a choice of one, he is precluded from thereafter pursuing the other. **The doctrine may be applicable as well where the remedies are against different persons as where they are against the same person."**

In 28 C. J. S. 1073, **Sec.** 8, the rule is stated as follows:

"Where a party has grounds to bring separate actions against different persons, and the maintenance of one necessitates the allegation of a fact, or the assumption of a position, inconsistent with, or repugnant to, the maintenance of another, he is bound by his election, and cannot proceed against the other. In other words, where a party has suffered an actionable wrong he will not be permitted to pursue inconsistent remedies against different persons."

In 18 **Am. Jur.,** 135, **Sec.** 12, the rule is states as follows:

"Whether co-existent remedies are inconsistent, is to be determined by a consideration of the relationship of the parties with reference to the right sought to be enforced as asserted in the pleadings. Two modes of redress are inconsistent if the assertion of one involves negation or repudiation of the other."

In 2 C.J. 843, Sec. 526, the text says:

> "While a person who has dealt with the agent of an undisclosed principal may elect to hold either the agent, or, upon discovery, the principal, **he cannot hold both,** and, if with full knowledge of the facts material to his rights **he elects to hold the agent, he thereby discharges the liability of the principal;** and conversely, if he elects to hold the principal, he thereby discharges the liability of the agent. **He must elect between the two, and when an election is once made he must abide by it,** unless the principal and agent have by their acts waived the right to claim that an election to hold one releases the other.

Among the many cases cited in support of this rule in the footnote appears the following:

> "(a) **Claim cannot be split.**—Where materials are furnished, and charged to the agent of an undisclosed principal, the creditor may, after discovering the facts, hold either the principal or agent, at his election, but **he cannot divide his claim, and hold both as principal debtors, the one for a part and the other for the remainder of the debt.** Booth v. Barron, 29 App. Div. 66, 51 NYS 391."

So in the case at bar either Jacob was the transferee or these petitioners were the transferees of the identical fund. Both could not be.

The same principal is applied in tort cases. In **McNamara vs. Chapman, 31 A. L. R. 188,** an action was brought in tort against the master and a recovery was obtained. Thereafter an action was brought against the servant for the same cause of action and liability was denied. The Court held:

"The plaintiff has his election to treat the master and servant as one and recover from the master, or to disregard their relation and recover from the servant. He could treat the servant's act as that of the master, but not as that of both master and servant. **Such situations are not unknown in other phases of the law** relating to acts done in a representative capacity. If an agent acts for an undisclosed principal, the other party to the transaction may, upon discovery of the facts, proceed against either; but, having elected to proceed against one, he cannot thereafter pursue the other. **He cannot maintain his action against both, nor, having elected with a knowledge of the facts to look to the agent, can he afterwards turn around and hold the principal.'** Chandler v. Coe, 54 N. H. 561, 568; Elkins v. Boston & M. R. Co. 19 N. H. 337, 342, 51 Am. Dec. 184.

"**On the contract side,** the reasonableness of the **rule** has been clearly seen, and it has been **uniformly applied.** The statements of the reasons for the rule in those cases are equally convincing here. 'Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal contract of the agents, and yet not their contract, but that of the principal. The vendor has a choice and was put to his election.' Tuthill v. Wilson, 90 N. Y. 423, 428.

. . . .

"In this case the plaintiff made his choice, his claim of identity prevailed, and he has a judgment thereon It may be that if the result of the former suit had been a judgment for the defendant upon the ground that identity was not shown, the plaintiff could have avoided being charged with having elected, because he had mistaken the facts as to identity. Noyes v. Edgerly, 71 N. H. 500, 53 Atl. 311. But where the judgment shows that there was no such error, that the facts were exactly as the plaintiff understood and claimed them to be, his election is complete, and he is bound by it."

Additional cases are cited in the annotation following that case.

That is just what respondent did here. He sought and obtained recovery for part of the debt from Jacob (claimed to be the agent) and now seeks to recover another part of the same debt from petitioners, who, respondent insists, are the principals.

The **Peir case**, cited by respondent (page 48), is not applicable. In that case the question decided by the prevailing opinion was not "estoppel by judgment" or "election of remedies." It was merely decided that payment "under protest" accompanied by a claim for refund made by one party claimed to be a transferee, did not constitute payment of the tax so as to discharge from liability those held to be transferees. The facts were that the Western Oxygen Co. (taxpayer) transferred its physical assets to the Air Reduction Co. in exchange for the capital stock of the latter company. The taxpayer later distributed the Air Reduction stock to its own stockholders as a liquidating dividend. Later a deficiency in tax was assessed against the taxpayer and having no assets with which to pay the same, the Commissioner **simultaneously** served a notice of transferee liability on the Air Reduction Co. and upon the stockholders of the taxpayer who received the Air Reduction stock. The Air Reduction Co. paid the amount so assessed "under protest" with a claim for refund, based on the ground that it was a purchaser of the physical assets of the Western Oxygen Co. for value. The claim for refund was allowed and the money paid by Air Reduction Co. was refunded to it.

In the transferee proceeding against the stockholders they contended that they were **discharged** from the liability **by the payment** made by the Air Reduction Co. This Court held:

> "The payment was a conditional one and does not act as a discharge until the conditions are resolved against the taxpayer . . . it may or may not be legally liable but until it has paid the tax and such payment is final and unconditional, the tax remains unpaid insofar as the rights of the others who may be liable are concerned.
>
> . . . .
>
> Should the determine that the payor was without liability, the situation will be exactly as though the payment had not been made . . .
>
> . . . .
>
> We agree with the Board in holding that the tax has not been paid as to bar the Commissioner from proceeding against petitioners for its collection."

It is thus apparent that the Court did not decide any question pertaining to estoppel or election of remedies but merely the question whether the conditional payment later refunded to the Air Reduction Co. constituted payment of the tax liability so as to discharge further liability therefor.

The question of election of remedies was apparently not an issue in the case. The two opinions of the Board of Tax Appeals (33 B. T. A. 643 and 34 B. T. A. 1059) discuss only the question of discharge by payment and the prevailing opinion does not discuss the question. The subject was touched upon by Judge Haney in his concurring opinion. It is obvious that he did not intend to convey the idea that the proceeding against one party did not constitute an election of remedies in all cases. He obviously intended to convey the idea that **under the facts in that case** the mere assertion of transferee liability against the Air Reduction Company simultaneously with the assertion of the liability against the stockholders of the taxpayer did not constitute an election. There never was any determination of the transferee liability by the Board of Tax Appeals or by any court. The Commissioner merely asserted the liability, Air Reduction Co. paid it under protest, coupled with a claim for refund, and the refund was made. Hence the excerpt from Judge Haney's opinion can not be authority against the position of the petitioners in this case.

In the **Peirce case, 255 U. S. 398,** which was cited by Judge Haney in connection with the aforesaid observation, the Government brought a suit for enforcement of a tax collection against a corporation that had assumed the liabilities of the taxpayer and it also brought a suit against stockholders as transferees of the taxpayer. That was clearly a case where both parties proceeded against, were liable for the tax; one party because it assumed the obligations and the other parties because they were transferees. There was no inconsistency in proceeding against both. In the case at bar Jacob and the present petitioners were not both liable for the corporation's tax. Either

Jacob was the transferee and liable for the whole of it, or these petitioners were the transferees and liable for the whole of it.

Sec. 77-259 O.C.L.A. provides:

> "All corporations that . . . have been dissolved by proclamation of the governor, as by law provided, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending any actions, suits or proceedings by or against them, settling their business, disposing of their property, both real and personal, dividing their capital stock, and doing any and all things necessary for the care and preservation of their property, both real and personal, but not for the purpose of continuing their corporate business. During such five-year period after such dissolution, they shall continue as such bodies corporate, for the purpose of causing to be executed on behalf of such corporations conveyances of or other instruments affecting title to such property, for being made parties to, and being sued in any action, suit or proceeding against them, for the recovery of any property, or the enforcement of any remedy against them, or against any property in which such corporations have an interest. During such five-year period after such dissolution, any suit, action or other proceeding may be instituted and maintained against any such corporations for the recovery of any property, or the enforcement of any remedy that might have been had prior to such dissolution."

In **Ray vs. Commissioner, 24 B.T.A. 94-96,** the Board held:

> "The respondent contends that he has met the burden of proof required of him when he has es-

tablished that the tax in question was assessed against the Falconer Mirror Company; that it has not been paid; that the said company was dissolved; that the petitioner was the owner of 15 shares of stock of that corporation; and that it distributed to its stockholders a liquidating dividend of 46 per cent. The law and the facts in the case at bar do not support his view. As we said in Continental Oil Co., 23 B.T.A. 311:

> " 'The provisions of section 280 constitute an extraordinary method of collecting the taxes of the person who is primarily liable therefor, and consequently they must be construed strictly against the respondent.'

"In Annie Temoyan, et al., Trustees, 16 B.T.A. 923, we said:

> " 'It is evident that the statute places a real burden on the Commissioner. He must establish the liability of the transferee against whom he proposes to proceed. He must establish all facts necessary to show that there is a liability at law or in equity on the part of the transferee for the payment of the whole or a part of the liability.'

"The mere facts that a corporation is dissolved and that its assets were distributed are not of themselves sufficient to hold the distributee."

. . . .

"It is obvious that the corporate existence of the Falconer Mirror Company continued after its dissolution. Indeed, the statute expressly authorizes such continuance for the very wise purpose of paying its creditors, collecting debts due to it, and doing such other acts as might be necessary in concluding its business. The taxes due from the Falconer Mirror Company are such debts as might have been collected from that corporation subsequent to its dissolution if there were funds available for their payment."

In the case at bar the dissolution did not take place until more than three and a half years after the alleged transfer and the corporation had assets during that time "available for their (taxes) payment."